

April 10, 2006

New Castle County-Civil Division

Honorable Nancy H. Wagner  
State Representative  
Legislative Hall  
P. O. Box 1401  
Dover, DE 19903

**RE: Charter School of Wilmington Preferences**

Dear Representative Wagner:

You have asked whether the student recruitment and selection process ("Process") at the Charter School of Wilmington ("School") complies with the Charter School Law.

An Attorney General's Opinion is appropriate when there is no issue of material fact to be decided and the question presented is one of law. As discussed below, however, in this case there are several factual issues that must be resolved in order to provide a definitive answer to your question. Moreover, the Charter School Law itself provides the appropriate means for evaluating and determining the legality of the School's student recruitment and selection process. Therefore, this opinion will not finally resolve this matter.

You have also asked "[i]f they are found to be in error, then the question will need to be posed as to how to enforce the law to make sure that they are in compliance." Again, the statute provides a process for enforcement. As discussed below, the Red Clay Consolidated School

District (“Red Clay”) is the School’s approving authority and is responsible for oversight of the charter school.<sup>1</sup> Additionally, the Department of Education (“Department”), the State Board of Education and the approving authority may conduct financial, programmatic, or compliance audits of any charter school.<sup>2</sup>

### *Historical Background*

The School is a Delaware public charter school whose charter was approved by Red Clay. The School opened in 1996. In its first few years of operation, there were fewer applicants than seats available and all who applied were admitted. Many students struggled with the school’s curriculum and the failure and attrition rate exceeded 25%. As a result, when applications exceeded the number of seats available, the school began to apply a system of admission preferences.<sup>3</sup> In 2003, the Auditor conducted an audit of the School and issued a report (“Report”) containing a factual conclusion that “[t]he Charter School of Wilmington . . . did not conduct a lottery for the over subscription of ninth grade students submitting applications for school year 2003/2004. . . .<sup>4</sup> However, in a letter dated February 4, 2004 with which he transmitted the Report to the Secretary of Education, the Auditor noted that:

We were not engaged to and did not conduct an examination, the objective of which would be the expression of an opinion on compliance [with the Charter School Law]. Accordingly, we do not express such an opinion.

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<sup>1</sup> 14 Del. C. §515(a)

<sup>2</sup> 14 Del. C. §513(c)

<sup>3</sup> The preferences and the processes by which they are implemented are as set forth herein and, to the extent required by 14 Del. C. §506(b)(3), the preferences are described in the school’s charter.

<sup>4</sup> Auditor’s *Final Report on Statewide Charter School Student Enrollment Agreed-Upon Procedures as of May 1, 2003*, at p. 4

Accordingly, the Auditor did not actually opine that the School's student recruitment and selection process was in violation of the Charter School Law. Nevertheless, acting in response to the Report the School amended its admission preferences. Specifically, the School amended its method of applying the "interest" preference provided for in 14 *Del. C.* §506(b)(3)c. That section permits an admission preference for "[s]tudents who have a specific interest in the school's teaching methods, philosophy, or educational focus." The statute provides no guidance as to how a charter school is to determine that a student has a "special interest."

In order to determine whether an applicant could receive the "interest" preference, the School adopted an admissions procedure that uses a combination of the following:<sup>5</sup>

1. Placement test which measures the applicant's exposure to math and reading;
2. The applicant's grades in 7<sup>th</sup> and 8<sup>th</sup> grade which shows the applicant's interest in math/science irrespective of at what level he/she was being taught in grade school. This factor does not try to compare one grade school to another;
3. Teacher Recommendations;
4. Enrollment in honor classes for math/science;
5. Activities in math or science extra-curricular functions; and
6. An essay written by the applicant.

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<sup>5</sup> The following is a verbatim description of the process provided to us by counsel for the School and Red Clay.

Each of the above factors is assigned a point total. The maximum score for each item is as follows:

Placement Test	198
Grade School Scores	120
Teacher Recommendation	25
Honor Courses	10
Extra-Curricular Activity	10
Essay	<u>20</u>
Total	383 <sup>6</sup>

The showing of interest cut-off is set at the 78<sup>th</sup> percentile; however, students who fall below the 78<sup>th</sup> percentile may still demonstrate that they have the requisite specific interest in the School's philosophy and educational focus of Math and Science. These students may request a personal interview with the School. The School uses panels of three (3) Faculty members to interview the applicants. Based upon the interviews, the Faculty may add applicants to those who have demonstrated a specific interest in the School's philosophy and educational focus.

Once the above process has established a pool of students who the School deems to have met the "interest" preference, then the following preferences are applied to the pool in the following order:

1. Red Clay residents;
2. Siblings;
3. Children of full-time employees;
4. Children of the School's founders.

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<sup>6</sup> Obviously this system heavily weighs in favor of an applicant's test score and grades.

If any seats remain to be filled, the School conducts a lottery among the pool of remaining students who have satisfied the “interest” preference. The result is that the School ranks preferences and, in effect, makes the “interest” preference a super preference for admission. The effect of this process is that only students who qualify for the “interest” preference are admitted to the school.

*The Charter School Law*

The law prohibits a charter school from restricting student admissions except by age and grade, and by lottery in the case of over-enrollment.<sup>7</sup> However, 14 *Del. C.* §506(b) provides:

Preferences in student admissions may be given to:

- (1) Siblings of students enrolled at the school;
- (2) Students attending an existing public school converted to charter status. Parents of students at a school converted to charter status shall be provided with a plan the district will use to address the educational needs of students who will not be attending the charter school;
- (3) Students enrolling in a new (non-converted) charter school may be given preference under the following circumstances as long as the school has described its preferences in the school's charter:

- a. Students residing within a 5-mile radius of the school;

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<sup>7</sup> 14 *Del. C.* §506(a)(3)a. and b.

b. Students residing within the regular school district in which the school is located;

c. Students who have a specific interest in the school's teaching methods, philosophy, or educational focus;

d. Students who are at risk of academic failure;

e. Children of persons employed on a permanent basis for at least 30.0 hours per week during the school year by the charter school.

(4) Children of a school's founders, so long as they constitute no more than 5% of the school's total student population. For the purposes of this paragraph, "founder" shall not include anyone whose sole significant contribution to the school was monetary, but otherwise shall be determined by the founding Board of Directors subject to Department of Education regulations.

The law does not directly address the rank ordering of preferences, nor does it provide any specific direction as to how preferences are to be applied. As noted above, oversight authority is vested in the School's approving authority, Red Clay, pursuant to 14 *Del. C.* §515. An approving authority has the ability to submit a school's charter to formal review and to order remedial measures including placing the school on probation or revoking

its charter.<sup>8</sup> The statute provides a process by which issues may be investigated, a school's comments may be received and, potentially, public hearings held to assist the approving authority in determining whether the school is in compliance. To our knowledge, none of those processes has occurred in this case. Further, the State Board of Education and the Department of Education have the authority to audit a charter school pursuant to 14 *Del. C.* §513. It is our understanding that discussions are currently underway between the Department and Red Clay to craft a process to implement the provisions of section 513.

#### *Discussion*

Preliminarily, we believe that a rank-ordered system of imposing admissions preferences may, if properly crafted and implemented, comply with the Charter School Law. The law does not require the granting of any preference. A charter school "may," but is not required to give a preference. 14 *Del. C.* §506(b). The law does not require that a charter school give all or any of the permitted preferences, nor does it restrict the order in which preferences may be granted until a school is fully enrolled. Accordingly, a charter school is not precluded from creating an admissions process that gives priority to certain preferences as a pre-condition to the imposition of other preferences permitted by law.

At the core of this matter is the School's application of the "specific interest" preference in 14 *Del. C.* §506(b)(3)c., and its use of a test and grades as a part of the method of determining eligibility for the preference. If that preference and the other preferences permitted by law are being properly applied and all eligible seats are filled as a result thereof, then there is no need to

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<sup>8</sup> 14 *Del.C.* §515(c) through (h), inclusive.

conduct any lottery other than the one described above. The potential problem with the School's process is that it assumes that a student's special interest may be determined by grades and test scores. In effect, the School assumes that success or doing well is the same as having a "specific interest" in the School's teaching methods, philosophy, or educational focus.

While we have solicited supporting materials from counsel for the School, we are without a factual record that would enable us to determine whether the test currently being used by the School is simply an aptitude test or a test that may also be used to reliably measure student interest. This is a question of psychometrics that is more properly left to the review and determination of those responsible for oversight under the statutory scheme; namely, Red Clay, the State Board of Education and the Department of Education. Likewise, we have no evidence that either proves or disproves that the use of grades is an appropriate measure of interest rather than simply a measure of aptitude. Again, at issue is the assumption that success in testing or the ability to achieve good grades is the functional equivalent of a demonstration of "specific interest." These are issues that merit serious examination and the input of educators with expertise in these areas. It would be inappropriate for us to assume facts that have not been established in the proper forum, and to substitute our determination for the informed judgments of appropriate experts in these highly specialized areas.

### *Conclusion*

For the reasons set forth above, we are unable to determine whether the student recruitment and selection process employed by the Charter School of Wilmington is compliant



The Honorable Nancy H. Wagner  
*Charter School of Wilmington*  
May 1, 2006  
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with the provisions of the Delaware Charter School Law. This is a determination that must be made pursuant to the processes provided by the Charter School Law.

Very truly yours,

John B. Hindman  
Deputy Attorney General

Approved by:

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Lawrence W. Lewis  
State Solicitor

Xc: The Honorable Carl C. Danberg  
Malcolm S. Cobin, Chief Deputy Attorney General  
Phillip Johnson, Opinion Administrator  
Alfred J. D'Angelo, Jr., Esq.